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No. 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

EASTERN STATES PETROLEUM CORP.,
Appellant,

v.

WILLIAM P. ROGERS,
Attorney General of the United States,
et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO RECALL THE JUDGMENT AND REINSTATE THE APPEAL

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO RECALL THE JUDGMENT AND REINSTATE THE APPEAL

Pursuant to Revised Rule 35 and the procedural precedents cited hereafter, appellant moves the court for an order which recalls the summary judgment of dismissal, 361 U. S. 7 (October 12, 1959), and redockets appellant's appeal.

Supporting Showing.

In support of this Motion appellant respectfully directs the attention of the Court to the following considerations:

I. Changed Circumstances. (Resume of case included):

A. *Exhaustion of Alternative Proceeding:* Following this Court's aforecited dismissal of direct appeal No. 70, 1959 Term, and this Court's simultaneous denial, 361 U. S. 805 (Oct. 12, 1959), of direct review by a proposed proceeding for extraordinary writs: Misc. No. 34, 1959 Term, Eastern States proceeded to perfect and argue its alternative appeal to the Court of Appeals for the District of Columbia Circuit; that appeal had been stayed to afford traditional priority to the direct proceedings in this Court.

On May 12, 1960 the Court of Appeals affirmed the District Judge's judgment, dismissing Eastern States Complaint brought under 28 U.S.C. §§1331 and 2282, which had been entered in the District Court pursuant to the memorandum decision by Judge McGarraghy, sitting alone, 177 F. Supp. 944 (D.D.C. 1958). The opinion of the Court of Appeals reached but rejected appellant's contentions on the questions concerning District Court jurisdiction and Eastern States' statutory and Constitutional rights to be heard, which were presented to this Court as Questions II, III, IV and V of the Jurisdictional Statement supporting our direct appeal to this Court. The opinion of the Court of Appeals is appended as Exhibit A.

Eastern States timely petition to the Court of Appeals for a rehearing *en banc* was denied on June 7, 1960; the order is appended as Exhibit B.

B. *Intervening Decision:* Since summarily dismissing Eastern States' appeal, this Court has adopted, upon plenary consideration, the critical subpoint of counsel's

contention in favor of this Court's jurisdiction over Eastern States' appeal, *viz.* the point that this Court's jurisdiction over appeals under Section 1253 *now* depends on the characteristics of the Complaint, not upon the nature of the result in the District Court. See *Florida Lime Growers v. Jacobsen*, 362 U. S. 73 (1960), quoted in II. B. 2, *infra*. Compare our Jurisdictional Statement at pp. 22-5 and 30.

II. Legal Contentions

A. *Concerning Form of Procedure and Timeliness:* In support of the procedural propriety and the timeliness of this Motion, appellant invokes two independent lines of authority.

(1) Appellant's prime argument assumes, (as we develop hereafter in Part B. 1), that this Court's orders of October 12 are properly to be read as being grounded upon an implicit conclusion that resort to this Court is currently judged to be premature when an appeal to a Court of Appeals is, *or may be*, available, under 28 U.S.C. 1291, despite its limiting exception in favor of direct appeals to this Court. If that assumption is sound, now that Eastern States has exhausted that less extraordinary opportunity for possible relief, without success, unripeness or exhaustion considerations no longer preclude resort to this Court. And, thus, it is now timely for Eastern States to tender to this Court the thus far unresolved question whether a claim for appellate relief like Eastern States' now falls within or without this Court's obligatory jurisdiction under Section 1253 (and hence within or without the jurisdiction of the Courts of Appeals under Section 1291 and its limiting exception). Appellant contends that this Motion is a proper and timely procedure for tendering that unresolved and now ripe question to this Court

for decision; the grounding of the Motion and favorable decision in *Cahill* v. *New York, New Haven & Hartford R. Co.*, 351 U. S. 183 (1956) provides persuasive, if not directly controlling, support for this contention. Indeed, the fact that this Motion was not preceded by a prior unsuccessful petition for rehearing, similarly grounded, make a granting of this Motion much less procedurally controversial than the grant of the Motion in the *Cahill* case, *supra*.

(2) Assuming that the summary dismissal of Eastern States' appeal is to be read as being grounded on an implicit conclusion against the existence of jurisdiction under Section 1253, (rather than on the prematurity ground on which we believe it was grounded), appellant contends that reconsideration of that conclusion is procedurally proper and presently timely, pursuant to the reasoning in *United States* v. *Ohio Power Co.*, 353 U. S. 98 (1957), and on analogy to the tenor of Rev. Rule 58 (2) because of this Court's subsequent decision, *during this term*, establishing the critical subpoint of our contention in support of this Court's jurisdiction, under Section 1253, over Eastern States' appeal; *see Florida Lime Growers* v. *Jacobsen*, quoted in part IV, 2, *infra*. Indeed, the fact that this Motion, the judgment sought to be recalled, and the *Lime Growers* decision have all come during the one, current, Term, make the granting of this Motion much less procedurally controversial that the grant of the petition in the *Ohio Power* case, *supra*. Moreover, the order sought to be recalled here clearly contemplated further (alternative) proceedings, and, thus, the doctrine of repose pertinent here is "law of the case", not "res judicata". And, "[i]n the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the Court rendering them in the same case, merely expresses the practice of courts

generally to refuse to reopen what has been decided, not a limit to their power." See *Messenger* v. *Anderson*, 225 U. S. 436, 444 (1912). See also *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199 (1950): "* * * the law of the case is only a discretionary rule of practice. It is not controlling here."

B. *Concerning the Propriety of Redocketing Eastern States' Appeal.*

Appellant-movant's alternative contentions in support of a redocketing of the appeal have been incidentally stated above.

Our first contention is that the orders of October 12 are properly to be read as being grounded on a prematurity ground, no longer operative. It remains here to show, in subdivision (1), that such a reading of the orders of October 12th is professionally proper.

Our alternative contention is that the order of October 12th, *summarily* dismissing this appeal, if properly to be read as being grounded on an *implicit* conclusion that this Court lacked jurisdiction under Section 1253, should be reconsidered in order to achieve conformity with the *expressed* conclusions concerning the proper determinant of jurisdiction under Sec. 1253, announced, after *plenary* consideration, in the *Line Growers* case. It remains here, in subdivision (2), to cite and quote that conclusion and to show how it conflicts with any (assumed) conclusion that this Court lacked jurisdiction under Section 1253 over Eastern States' appeal.

The solid substantiality and public importance of the questions that will be presented for decision, if this Court entertains this appeal, was documented in our Jurisdictional Statement and in our Petition For Writs of Mandamus. The opinion of the Court of Appeals crystalized these questions into sharper issues. But, the grounds

on which that opinion rejected Eastern States contentions did not disclose any previously overlooked arguments or authorities, nor otherwise undermine the solid substantiality of appellant's contentions. Thus, appellant will not burden this Motion with a repetition of its prior showing concerning the substantiality of Questions II, III, IV and V or with the further authorities and arguments presented to the Court of Appeals.

(1) This Court's summary decisions of October 12th, denying direct review of the memorandum dismissal of the single judge below, included no citation to controlling authority. However, the order which dismissed the direct appeal was worded so as to grant the dismissal alternative of appellees' Motion To Dismiss or Affirm. But that dismissal motion was grounded on alternative, inconsistent, positions; ultimately, however, it rested upon a contention that:

> "Appellant here has filed timely notice of appeal to the Court of Appeals for the District of Columbia Circuit. The decision of the single judge district Court, if erroneous, can be corrected in that court. Hence this Court's dismissal of the present appeal would not affect appellant's *proper* remedy. *Cf. Phillips* v. *United States*, 312 U. S. 246, 254." (Emphasis Supplied).

See appellees' Motion To Dismiss or Affirm at p. 12.

But this (apparent) contention that Eastern States' (only) "proper remedy" was an appeal to the Court of Appeals is in direct conflict with this Court's thus far unrepudiated holding in *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 16 (1930). What then is the meaning properly to be drawn by the profession from this Court's order?

The answer is not clear. Indeed, the Justices may well have joined in a conclusion to dismiss on several differing

grounds. In these circumstances, and since appellant conceded, at page 5 of its Brief in Opposition to Appellees' Motion, citing 18 U.S.C. §3731 and *Ex parte Cogdell*, 342 U. S. 163 (1953), that

> "* * * recognition of jurisdiction over appeals, adequate to permit a determination whether an action was or was not one which required trial by three judges, in *both* this Court and the Courts of Appeals would not be unprecedented,"

appellant suggests the propriety of a reading of the summary dismissal of October 12th, as follows: The dismissal order of October 12th is properly to be read as resting upon the narrow ground, building on the reasoning in *Ex parte Cogdell, supra*, that deliberations in this Court of single judge rejections of contentions that claims require three judge-direct appeal determination are now premature before exhaustion of any possibility of review in the Courts of Appeals under Section 1291 not foreclosed, via its limiting exception, by prior holdings in favor of exclusive jurisdiction in this Court under Section 1253.

In further support of a narrow reading of the dismissal order of October 12th, appellant suggests that such a reading would merely effect a further limitation of *Stratton*, in favor of this Court's modern conservatism concerning *direct* review of single-judge decisions, by any form-of-proceeding; and, such a reading would avoid a summary and silent repudiation of the landmark holding, in *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911), which established that one asserting a three judge-direct appeal claim is entitled by those statutes to resort to those Courts *as a matter of right* not of this Court's discretion, as would be the situation if resort here were possible only by petition for certiorari to the Court of Appeals. The holding in *Ex parte Metropolitan Water*

Co., is set forth and discussed in the Jurisdictional Statement at 17 note 6 and 27-30.

The difference between the dismissal here and the stay in *Ex parte Cogdell*, *supra* lacks critical meaning. See *Far East Conference* v. *United States*, 342 U. S. 570, 576-7 (1952).

2. As clearly set forth in our Jurisdictional Statement at 3-5, 22-25 and 30, and amplified at pages 3-4 of our Brief In Opposition to appellees' Motion To Dismiss, appellant has contended that a question, as here, whether or not this Court has jurisdiction over an appeal under Section 1253 now turns (as does a question concerning three judge jurisdiction under Sections 2281 and 2282), upon whether the complaint and "action" is or is not judged to be of the type described in Sections 2281, 2282 and 2284, rather than, as was formerly true, upon the form of the result in the District Court (and, at the trial level, upon whether an application for a preliminary injunction was or was not filed and pressed in the case).

The majority and dissenting opinions in *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73 (1960) concur in recognizing that it is the character of the "complaint", not of the "result" in the District Court, which determines whether or not this Court has jurisdiction under Section 1253 over an appeal. As Justice Frankfurter put it in his dissent:

> "I start with the proposition, as I understand the Court to do, that whether a case is one directly appealable here under 28 U.S.C. 1253, 28 U.S.C.A. §1253, depends upon the complaint, and not upon the result in the District Court."

See 362 U. S. at 89. In the opinion for the Court, see 362 U. S. at 75-6, 81 and 85.

If the summary dismissal of Eastern States' appeal is properly to be read as resting upon an implicit conclusion

against jurisdiction under Section 1253, rather than on a prematurity ground, as we believe to be proper, then the expressed conclusions in the *Lime Growers* case, establishing the proper determinant for the presence or absence of jurisdiction under Section 1253, dictate reconsideration of this Court's jurisdiction, under Section 1253, over Eastern States' appeal, because, as was just shown, the jurisdictional contention of Eastern States was critically grounded on *the* position, concerning *the* proper determinant of jurisdiction under Section 1253, that was subsequently adopted by this Court, after plenary consideration, in the *Lime Growers* decision.

Conclusion

Wherefore, appellant moves the Court to enter an order recalling its October judgment of dismissal and redocketing Eastern States' appeal. Appellant further prays that the order redocketing the appeal direct that the case be docketed for plenary consideration and scheduled for an oral argument of at least one hour's duration.

Respectfully submitted,

GERARD R. MORAN,
Counsel for Appellant.

APPENDIX OF EXHIBITS

Exhibit A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15109

EASTERN STATES PETROLEUM CORPORATION, APPELLANT

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided May 12, 1960

Mr. Gerard R. Moran, of the bar of the Supreme Court of Virginia, *pro hac vice*, by special leave of court, with whom *Mr. Edwin G. Martin* was on the brief, for appellant.

Mr. Seymour Farber, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, and *Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, BAZELON and FAHY, Circuit Judges.

BAZELON, *Circuit Judge*: This appeal from the District Court relates to appellant's attack, begun in the United States Customs Court some eight years ago, upon the tax

rate imposed upon petroleum imports between January 1, 1951 and October 11, 1952. The Customs Court proceedings were stayed pending the outcome of two other cases raising substantially identical questions. The importers in these cases contended that the President's proclamation increasing the duty from one-fourth to one-half cent per gallon was contrary to statute and an unconstitutional exercise of power.[1] The Court of Customs and Patent Appeals ultimately rejected these claims and the Supreme Court denied certiorari.[2]

Appellant, whose case is still pending in the Customs Court, then brought the instant suit to enjoin the Attorney General, the Secretary of the Treasury, and their subordinates from enforcing the tax through proceedings in the customs courts.[3] The complaint asserted that, as a result of the unfavorable decisions in the two companion cases, appellant's opportunity to secure recognition of its constitutional rights in the customs courts has become "so onerous, hazardous and speculative that it constitutes an inadequate remedy * * * which plaintiff may by-pass" to secure redress in a tribunal with statutory authority to enjoin administrative officials. It also asserted that Article III and the due process clause of the Constitution entitle it to have its constitutional claims

1. Specifically, the importers' position is that a provision in the Reciprocal Trade Agreements Act then in force, 19 U.S.C. § 1351 (1952), prohibited the President from increasing the duty by more than fifty percent. The importers further contend that if, as the Court of Customs and Patent Appeals held, such limitation does not apply to the type of increase here involved, there are no constitutionally adequate statutory standards to guide the President in the exercise of his rate revising authority.

2. *United States* v. *Marcus Trading Foreign Corp.*, 42 C.C.P.A. (Customs) 38, *cert. denied*, 348 U.S. 858 (1954); *United States* v. *American Bitumuls & Asphalt Co.*, 240 F.2d 270, 44 C.C.P.A. (Customs) 139, *cert. denied*, 355 U.S. 883 (1957).

3. This refers to both the Customs Court and the Court of Customs and Patent Appeals.

adjudicated in a court created under Article III. Appellant requested that a three-judge court be convened, pursuant to the provisions of 28 U.S.C. § 2282 (1958).

The Government moved to dismiss the complaint for lack of jurisdiction. District Judge McGarraghy, sitting alone, granted the Government's motion. Appellant thereupon applied to the Chief Judge of this Circuit for an order designating two additional judges to complete a three-judge district court. Chief Judge Prettyman denied the motion.[4] Appellant then sought review from Judge McGarraghy's ruling by direct appeal to the Supreme Court, and moved for leave to file a petition for a writ of mandamus against Chief Judge Prettyman and District Judge McGarraghy. The Supreme Court dismissed the appeal and denied the motion.[5] Appellant thereupon prosecuted the present appeal from the dismissal below.[7]

We think the District Court correctly decided that it lacked jurisdiction. Under the distribution of judicial power which Congress has established, the Customs Court has "*exclusive* jurisdiction to review on protest the decisions of any collector of customs. * * *" 28 U.S.C. § 1583 (1958) (emphasis supplied). Conversely, 28 U.S.C. § 1340 provides that "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for * * * revenue from imports or tonnage *except matters within the jurisdiction of the Customs Court*." 28 U.S.C. § 1340 (1958) (emphasis sup-

4. 105 U. S. App. D.C. 219, 265 F.2d 503 (1959).

5. *Eastern States Petroleum Corp.* v. *Peterson*, 361 U.S. 7 (1959).

6. *Eastern States Petroleum Corp.* v. *Prettyman*, 361 U.S. 805 (1959).

7. Our jurisdiction to review the action of the District Court is not questioned. *See Wilkes* v. *Southern Pacific Co.*, 231 F.2d 139 (9th Cir.), *cert. denied*, 351 U.S. 940 (1956).

Appellant protected its right of appeal to this court by securing from the District Court extensions of the time in which to docket the record on appeal.

plied). This jurisdictional scheme is not limited to non-constitutional matters, for it is clear that the customs courts can and do, as in the two companion cases, pass upon constitutional questions. *Horton* v. *Humphrey*, 146 F. Supp. 819, 821 (3-judge court, D.D.C.), *affirmed per curiam*, 352 U. S. 921 (1956); *Morgantown Glassware Guild, Inc.* v. *Humphrey*, 98 U. S. App. D.C. 375, 236 F. 2d 670, *cert. denied*, 352 U. S. 896 (1956). Decisions of the Court of Customs and Patent Appeals are reviewable in the Supreme Court on writ of certiorari, 28 U.S.C. § 1256 (1958).

Appellant contends, however, that the District Court has jurisdiction notwithstanding the exception in § 1340, since this is not a case "arising under any Act of Congress providing for * * * revenue from imports * * *." Rather, they contend it is a case "arising under the Constitution, laws, or treaties of the United States," and thus within the ambit of 28 U.S.C. § 1331 (1958). Section 1331 vests federal question jurisdiction in the district courts and, unlike § 1340, contains no exception relating to Customs Court jurisdiction. But we do not agree that Congress' failure to provide an exception to § 1331 similar to that specified in § 1340 indicates an intent to open a loophole in its clear purpose to exclude customs cases from the district courts. When Congress provides a specific judicial remedy, relief may generally be accorded only through the specified procedure. Cf. *Lichter* v. *United States*, 334 U. S. 742, 789-93 (1948); *Lockerty* v. *Phillips*, 319 U. S. 182 (1943). Moreover, the right to equitable relief presupposes the non-existence of an adequate remedy at law. The customs courts provide an adequate remedy except in cases of extreme hardship, *Horton* v. *Humphrey*, *supra*. The fact that the customs courts are likely to reject appellant's constitutional claims does not make this a case of unusual hardship. *Cottman* v. *Dailey*, 94 F.2d 85, 89 (4th Cir., 1938).

Appellant attacks the foregoing construction of these jurisdictional statutes on the ground that, at some stage of the litigation, it is constitutionally entitled to have its constitutional claims heard and determined in an Article III court, and that such a hearing must be available as of right and not as a matter of discretion.

There is at the outset considerable doubt as to whether the customs courts are legislative rather than Article III courts. Some years ago, the Supreme Court held that the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was a legislative court, *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929); that is to say, it was a court created under the congressional power "to lay and collect Taxes, Duties, Imposts and Excises," U. S. Const. art. I, § 8, and not under the power to "ordain and establish" courts inferior to the Supreme Court, U. S. Const. art. III, § 1. But Congress has recently revised the statutes creating the customs courts and stated that they are "hereby declared to be * * * court[s] established under Article III of the Constitution of the United States." 28 U.S.C. §§ 211, 251 (1958). Petitioner contends, however, that such declaration is ineffective to create an Article III court because the Supreme Court said in *Bakelite* that "whether a court is of one class or the other [does not] depend on the intention of Congress * * * the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U. S. at 459. But see 1 Moore, Federal Practice, ¶ 0.4[4] (1959).

We do not decide, however, whether the expression of congressional intent is sufficient to transform the customs courts into Article III tribunals. For even if the customs courts are still legislative courts we think petitioner's argument must fail. It was previously, and we think correctly, rejected in *Ricomini* v. *United States*, 69 F.2d 480, 483-84 (9th Cir. 1934).

We recognize, as appellant argues, that "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored." *Lockerty v. Phillips*, 319 U. S. 182, 188 (1943); see *Lynch v. United States*, 292 U. S. 571, 586-87 (1934). And we assume, for present purposes, that the congressional power to confer and withdraw federal jurisdiction is itself subject to constitutional limitations, including those of due process. *Crowell v. Benson*, 285 U. S. 22, 58 (1932); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U. S. 887 (1948); see HART & WECHSLER, FEDERAL COURTS AND THE FEDERAL SYSTEM 312-40 (1953). But this is not a case where there is an asserted constitutional right without a constitutionally adequate remedy. Certiorari may be sought in what is obviously an Article III court. And even in cases where an adverse decision of the customs courts involving constitutional questions stands unreviewed, we do not think the taxpayer is denied due process. In our view, the distinctions between the customs courts and the district courts do not rise to a level at which it may be said that final adjudication of constitutional questions in the customs courts offends the requirements of due process. Judges of the customs courts, like judges of Article III courts, are appointed by the President, with the advice and consent of the Senate, and serve during good behavior.[8] Customs courts entertain "cases and controversies" within the meaning of Article III, as shown by the fact that these cases are reviewable

8. See 28 U.S.C. § 213 (Court of Customs and Patent Appeals), § 252 (Court of Customs), § 44 (circuit courts), § 134 (district courts) (1958).

Judges of the Customs Court receive the same salary as district judges, compare 28 U.S.C. § 213 (1958) with 28 U.S.C. § 135 (1958); judges of the Court of Customs and Patent Appeals receive the same salary as circuit judges, compare 28 U.S.C. § 252 (1958) with 28 U.S.C. § 44(d) (1958).

by the Supreme Court under its appellate jurisdiction.[9] We therefore reject appellant's constitutional objections to its exclusion from the District Court.

The only remaining question is whether the District Court was authorized to dismiss the complaint without requesting the convening of a three-judge court.[10] Prior to 1942, the law was well settled that "the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction" and "does not require three judges to pass upon this initial question of jurisdiction." *Ex parte Poresky*, 290 U. S. 30, 31-32 (1933).

Petitioner asserts, however, that the 1942 amendment providing that "A single judge shall not * * * dismiss the action" has overturned the prior rule.[11] Although there

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9. *United States v. Stone & Downer Co.*, 274 U.S. 225, 232-33 (1927); *see, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); cf. *Pope v. United States*, 323 U.S. 1, 13-14 (1944). See generally ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 248-49 (2d ed. Wolfson & Kurland 1951).

10. 28 U.S.C. § 2282 (1958) provides that an "injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted * * * [except] by a district court of three judges under section 2284 of this title."

11. 28 U.S.C. § 2284 now reads in pertinent part:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.
>
> * * *
>
> (5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil

are some shreds of legislative history to support this view,[12] consistent judicial construction has rejected it. In *White* v. *Gates*, 102 U. S. App. D.C. 346, 253 F.2d 868, *cert. denied*, 356 U. S. 973 (1958), this court said, "without convening a three-judge court * * * a single judge may still dismiss a complaint that * * * fails to raise a substantial constitutional question." The Ninth Circuit reached the same conclusion in *Wicks* v. *Southern Pacific R.R.*, 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U. S. 946 (1956). And in *Jacobs* v. *Tawes*, 250 F.2d 611 (4th Cir. 1957), the Fourth Circuit held that a single judge may dismiss an application for a three-judge court if the district court, no matter how constituted, lacks jurisdiction. Finally, Chief Judge Prettyman, in an earlier phase of this litigation, reached the same conclusion. 105 U. S. App. D.C. 219, 265 F.2d 593 (1959). As these decisions make clear, the provision of § 2284 precluding single-judge dismissal, along with the other procedural requirements of that section, becomes operative only after a three-judge court is convened. This is implied from the introductory passage of § 2284, reprinted in the margin at note 7.

The action of the District Court is therefore

Affirmed.

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procedure. A *single judge shall not* appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or *dismiss the action*, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing. [Emphasis supplied.]

12. Petitioner places particular reliance upon a report of the Bar Association of the City of New York stating that it believed the bill would overrule *Ex parte Poresky*, 290 U. S. 30 (1933), and that this result was desirable. See H R Rep No. 1677, 77th Cong., 2d Sess. 5 (1942). But there is no indication that any member or committee of Congress embraced this suggestion or anticipated such a result.

Exhibit B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,109 September Term, 1959

EASTERN STATES PETROLEUM CORPORATION,
Appellant,

v.

WILLIAM P. ROGERS, Attorney General of the United States, *et al.*,
Appellees.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Basfian and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of the appellant's petition for rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: June 7, 1960